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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1957.

STATE OF GEORGIA,
WESTERN & ATLANTIC RAILROAD, and
LOUISVILLE AND NASHVILLE RAILROAD COMPANY, - - - - - Appellants,

vs.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION,
Et Al., - - - - - - - - - Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA.

JURISDICTIONAL STATEMENT.

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STATE OF GEORGIA,
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COMPANY, - - - - - - - - *Appellants,*

v.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION,
ET AL., - - - - - - - - - *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA.

JURISDICTIONAL STATEMENT.

Appellants appeal from the judgment of the United States District Court for the Northern District of Georgia, entered on October 21, 1957, sustaining an order of the Interstate Commerce Commission, and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW.

The opinion of the District Court for the Northern District of Georgia, Atlanta Division, is reported in 156 F. Supp. 711. A copy of the opinion is attached hereto as Appendix A. The decision of the Interstate Commerce Commission (Division 4) is reported in 295 I. C. C. 363, and is reproduced as Appendix B hereto. The Commission's orders of September 4, 1956 and February 12, 1957, are reproduced as Appendix C and Appendix D, respectively.

The district court's opinion was entered as its order.

JURISDICTION.

This suit was brought by appellants under Title 28, United States Code, Sections 1336, 1337, 1398, 2321, 2322 and 2325, to annul and set aside orders of the Interstate Commerce Commission. The judgment of the three-judge district court dismissing the complaint was entered on October 21, 1957, and notice of appeal was filed in that court on December 12, 1957. The jurisdiction of the Supreme Court to review this decision on direct appeal is conferred by Title 28, United States Code, Sections 1253 and 2101(b). Jurisdiction of this Court to review the judgment on direct appeal in this case is sustained by *Thompson* v. *United States*, 343 U. S. 549, 554 (1952), and *Dixie Carriers* v. *United States*, 351 U. S. 56, 58 (1956).

THE STATUTES INVOLVED.

The questions arise under the provisions of the Interstate Commerce Act governing construction of new lines of railroad and extensions of existing lines, and spur, industrial and other trackage. 41 Stat. 477; 49 U. S. C., Secs. 1(18) and 1(22). The statutes are reproduced in full in Appendix E. The specific provisions involved in this action are:

> Section 1(18). "No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad . . . unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction . . . of such additional or extended line of railroad . . . ."
>
> Section 1(22). "The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction . . . of spur, industrial, team, switching, or side tracks, located or to be located wholly within one State . . . ."

QUESTIONS PRESENTED.

The questions arise from a proposal of appellants to construct trackage to a newly developed, limited area adjacent to their main-line right of way at Boyce, Tennessee. This right of way is jointly occupied by their main line and by the parallel main line of the intervening appellee, Cincinnati, New Orleans & Texas

Pacific Railway,[1] under an easement granted by the owner, the appellant State of Georgia.[2] An industrial track, the same in character as the proposed trackage, was built by Southern, the easement carrier, from the joint right of way to the area, connecting with the industries located there. For many years the owner line has served and now serves the area and the same industries by means of a team track and by reciprocal switching[3] performed for it by the easement carrier as its agent.

The questions presented are:

1, Whether by reason of the rule relating to "invasion" by one railroad of the territory of another, promulgated in *Texas & Pac. Ry.* v. *Gulf., etc., Ry.*, 270 U. S. 266 (1926), the proposed trackage is an extension of line within the meaning of Sec. 1(18) of the Interstate Commerce Act rather than a spur or industrial track within Sec. 1(22), and thus, whether the Interstate Commerce Commission had jurisdiction over its construction.

---

[1]Constructed by the Cincinnati Southern Railway, now under lease to the Cincinnati, New Orleans & Texas Pacific Railway. The latter is a member line of the Southern Railway System. All are hereinafter referred to, individually or collectively, as "Southern" or "easement carrier".

[2]The State of Georgia, as owner, constructed the Western & Atlantic Railroad which, until recently, was continuously operated under lease by The Nashville, Chattanooga & St. Louis Railway. The latter was merged with the Louisville and Nashville Railroad Company which today operates the Western & Atlantic as its main line between Chattanooga, Tennessee, and Atlanta, Georgia. These lines and the State of Georgia are hereinafter referred to, individually or collectively, as "appellants" or "owner line".

[3]See pages 15-16, *infra*, for definition and discussion of reciprocal switching.

(a) In the circumstances here present is the limited industrial area involved "new territory" to the owner line?

(b) Is the term "serve" as used by the Supreme Court in the *Texas & Pacific* case limited to service over trackage owned and operated by the railroad proposing the new construction, or does it include service by other means?

(c) Did the owner line, by deferring construction until economically justified, employing in the meantime the easement carrier as its agent to perform mere switching, forfeit its right to serve the area by its own trackage, and did the industries located there lose the right to such direct service?

2. Whether the proposed trackage, judged by established criteria other than the rule of invasion, would constitute a spur or industrial track excluded from the authority of the Commission by paragraph (22) of Section 1 of the Act.

3. Whether the evidence of record supports the district court's interpretation of the Commission's report as constituting a finding that the proposed construction "would either jeopardize the stability of earnings of one or the other roads, make unlikely an adequate return for one or the other on its investment or create such competition as would injure one of the two roads, and the harmful effect of such condition would be 'inimical to the public interest.'"

4. Whether the scope of the authority conferred upon the Commission by Section 1(18) of the Act, as

limited by paragraph (22), requires independent judicial determination unfettered by preliminary findings and conclusions of the Commission, and whether the district court abdicated its judicial function in holding that the facts bearing upon the jurisdictional question were not subject to its review.

(a) Is there a legal distinction between questions involving the exercise of administrative discretion by the Commission and those relating to its jurisdiction under the Act, requiring judicial determination of the latter unhampered by findings made by the Commission?

(b) Do findings by the Commission on the issue of public convenience and necessity under Section 1(18) of the Act preclude independent judicial inquiry and determination of the facts by the court on the issue of Commission jurisdiction?

STATEMENT OF THE CASE.

The Western & Atlantic Railroad, extending from Atlanta, Georgia, to Chattanooga, Tennessee, was constructed by its present owner, the State of Georgia, and placed in service in 1850 (Tr. 197).[4] It is regarded by the State as its most valuable piece of property, care of which is entrusted to the Georgia Public Service Commission (Tr. 198). The main line passes through Boyce, Tennessee, a suburb of Chattanooga about five miles from appellants' station in that city. It has been

[4] "Tr." designates the transcript of the record of the hearing before the Commission, a certified copy of which is a part of the record in this appeal.

operated continuously since 1883 by the appellant Louisville and Nashville Railroad Company or The Nashville, Chattanooga & St. Louis Railway,[5] under various leases from the State of Georgia (Tr. 198).

In 1879 Georgia granted to the Cincinnati Southern Railway, lessor of the intervening appellee, Cincinnati, New Orleans & Texas Pacific Railway, an easement for the construction of that company's main line upon Western & Atlantic Railroad's right of way from Boyce into Chattanooga, conditioning the grant upon maintenance by the easement carrier of its track at the same grade as that adopted by the Western & Atlantic (Exhibit H-3, Tr. 204, 213). The easement carrier's main line between those points is located on the west side of appellants' main line and runs parallel with it. Appellee Cincinnati, New Orleans & Texas Pacific Railway is now a part of the Southern Railway System (Tr. 236).

The area in which appellants' proposed trackage is to be constructed roughly approximates a triangle the base of which is formed by their right of way and the other two sides by the Tennessee River and Chickamauga Creek (Appendix F). Until recent years it was subject to flooding of the river and creek and was unsuitable for large industry (Tr. 22). However, upon completion of Chickamauga Dam by the Tennessee Valley Authority, the danger of flood was overcome (Tr. 221) and through promotional activities of the

[5]Merged with Louisville and Nashville Railroad Company by agreement approved by the Commission in *Louisville & N. R. Co. Merger*, 295 I. C. C. 457 (1957). [6]Louisville and Nashville Railroad Company was substituted as party plaintiff in the district court.

Chattanooga Chamber of Commerce industrial development began in 1952 (Tr. 186, 190).

The Boyce industries comprise two groups—those in existence prior to 1952 and those established since that time. With one exception, all are located on an industrial lead of Southern called the "river track" (Tr. 320). The first group is composed of several small factories having no interest in the proposed new track and whose traffic has been and is inconsequential compared with that of the second—the recently located industries here involved seeking the track connection proposed by appellants (Tr. 130-1, 142-3, 174). All are served by both appellants and Southern. Track facilities of Southern consist of a spur running from the southwest end of its freight yard, serving only the Quaker Oats Company, and the "river track," leading from the opposite end of the yard to turn-outs connecting with the other industries (Appendix F).

Appellants' service in the Boyce area is rendered by two means: (1) by a public team track near the center of the community at which cars are received and delivered (Tr. 100, 107; Exhibit H-1, Tr. 40, 58), and (2) by reciprocal switching (Tr. 130, 132-3, 140, 142, 143, 172). Historically the area has been included in the Chattanooga switching district by tariff publication (Tr. 194; Exhibit H-2, Tr. 96, 127). Excepting the period between June 23, 1954, and October 25, 1957, appellants have for more than forty years served and are now serving the industries, both old and new, employing Southern as their agent to perform the neces-

sary switching.[6] The purpose of the proposed trackage is to enable appellants to improve, with their own facilities, the services they now provide (Tr. 25).

A graphic portrayal of the situation is given by map "A" of Appendix F. The trackage is to be projected from a passing track of appellants near Boyce for approximately .9 of a mile to the plants of Cramet, Inc. and Heavy Minerals Company; thence 1.12 miles to a connection with the industry tracks of Central Soya Company, and from that point continued for 2.02 miles to the plant of the Quaker Oats Company—a total distance of approximately 4.04 miles (Exhibit H-1, Tr. 40, 58). The main line of Southern will be crossed by a new bridge (Tr. 27).

The track will be used only for switching loaded and empty freight cars to and from these industries (Tr. 13). No train schedules will be offered and no through trains operated over the track, and none of the appurtenances necessary to main or branch line operation, such as buildings and loading platforms or telephone and telegraph service, will be provided. No station or agency will be established or agent maintained in connection therewith since the track, being the same in

[6]The noted interruption of service was brought about by the unlawful act of Southern in undertaking to exclude the Boyce industries from the Chattanooga switching district through tariff publication effective June 23, 1954. Upon complaint of the new industries the Commission ordered Southern to restore them to the district. I. C. C. Docket No. 31737, *Cramet, Inc.* v. *Alabama, G. S. R. Co., et al.*, 298 I. C. C. 439 (1956). This became effective October 25, 1957, and appellants' services were resumed on that date. The Commission's action was upheld in *Southern Railway Co., et al.* v. *United States, et al.*, 154 F. Supp. 562 (U. S. D. C. Va., 1957), which judgment was affirmed by this Court in Docket No. 579 on January 13, 1958.

character as other switching facilities in the Chattanooga switching district, will be under the supervision and control of appellants' agent at that point (Return to Questionnaire, p. 17; Tr. 15-16).

On May 27, 1955, in pursuance of the new industries' requests for direct track connection, appellants applied to the Interstate Commerce Commission for a certificate of public convenience and necessity authorizing the proposed construction under Section 1(18) of the Act. The State of Georgia and one of the industries intervened in support and the appellee Southern and its affiliates intervened in opposition. Finance Docket No. 18942, *Nashville, Chattanooga & St. Louis Railway, et al., Construction,* 295 I. C. C. 363 (1956). Before any action had been taken thereon by the Commission, appellants filed a motion to dismiss the application for lack of jurisdiction on the ground that the trackage would be a spur or industrial track expressly excluded from Commission authority by paragraph (22) of Section 1 of the Act.

The Commission held that the Boyce area is served exclusively by Southern; that the construction would constitute an invasion of Southern's territory; that the area is "new territory" to appellants and consequently, under the rule of *Texas & Pac. Ry.* v. *Gulf, etc., Ry.*, 270 U. S. 266, 278 (1926),[7] the track would be an extension of line (Appendix B-22). Accordingly, it overruled the motion to dismiss (Appendix C, Report and Order of September 4, 1956). By the same order the

[7]The rule and underlying reasons for it are quoted herein at pages 13-14.

application was denied. Appellants' petition of October 15, 1956, for reargument and reconsideration was denied by the entire Commission on February 12, 1957 (Appendix D).

This action was brought by appellants to annul and set aside the Commission's orders. Basing its judgment upon the Commission's findings, the district court dismissed the complaint, holding that the case is controlled by the construction placed upon the statute by this Court in the *Texas & Pacific* case (Appendix A-8). It found that the Boyce area is "new territory" to appellants; that the service appellants render to the industries in that area is not service in the sense in which this Court used the word "serve" in the rule cited; and concluded that the proposed trackage would be an extension of line subject to the Commission's authority under Section 1(18) (Appendix A-11).

In the lower court the appellees raised the question of the scope of the reviewing power of the court in determining the issue of Commission jurisdiction, insisting that it was bound by the Commission's findings of fact on that issue if any basis therefor could be found in the record. Appellants contended that the jurisdictional issue must be determined independently by the Court upon its own inquiry into the facts. This question the district court declined to decide, stating that the basic facts on which the jurisdictional question must be resolved "are supported by substantial evidence and are therefore not subject to review by this court" (Appendix A-3).

THE QUESTIONS ARE SUBSTANTIAL.

The Commission and the district court have so interpreted a rule of construction of this Court relating to the statutes governing railroad track construction as to deprive appellants of their right to serve with their own facilities an important segment of the public they presently serve by other means. A meaning is attributed to the rule which could not reasonably have been intended when formulated; moreover, the case out of which it grew was entirely different in fact and circumstance from that here presented.

Appellants were the first to provide railroad transportation at Boyce and subsequently permitted Southern's entrance there by granting it an easement to occupy jointly their right of way. From the beginning appellants continuously have held themselves out to serve the public at Boyce as the need for transportation by railroad has arisen. Only recently the area adjacent to the joint right of way became available to large industry requiring substantially increased railroad services, and immediately upon the beginning of its development appellants undertook to make provision therefor. They have always served the several small factories there and today serve them, as well as the recently established large industries, by a team track and through reciprocal switching. Notwithstanding these undisputed facts, and despite findings by the Commission and the district court that appellants have for many years served and today serve the area, both held that the area is "new territory" as to appellants

(Appendix A-11; Appendix B-11, B-22). The court held further that appellants' existing service is not the kind of service contemplated by the decision which is said to control this case (Appendix A-11). A misconception of the facts of both cases is largely accountable for these holdings.

1. The Texas & Pacific Case Does Not Control Here.

(A) NO PART OF THE BOYCE AREA IS NEW TERRITORY TO APPELLANTS.

Section 1(18) of the Act forbids construction of extensions of line by a railroad unless a certificate of public convenience and necessity has been obtained from the Commission. By Section 1(22) spur and industrial trackage located wholly within one state is removed from the Commission's authority.

The applicability of these statutory provisions is affected by the decision in the *Texas & Pacific* case wherein the concept of "invasion" of the territory of one railroad by another through construction of new trackage was introduced by this Court. It stated:

> "If the purpose and effect of the new trackage is to extend substantially the line of a carrier into *new territory*, the proposed trackage constitutes an extension of the railroad within the meaning of paragraph 18, although the line be short and although the character of the service contemplated be that commonly rendered to industries by means of spurs or industrial tracks." (270 U. S. at p. 278; emphasis supplied)

The reason for this ruling is found in the discussion immediately preceding it on the same page of the opinion where it is said:

> ". . . where the proposed trackage extends into territory *not theretofore served by the carrier,* and particularly where it extends into territory already served by another carrier, its purpose and effect are, under the new policy of Congress, of national concern. For invasion through new construction of territory adequately served by another carrier, like the establishment of excessively low rates in order to secure traffic enjoyed by another, may be inimical to the national interest." (Emphasis supplied)

From this it appears that applicability of the rule depends upon whether the territory sought to be reached is new to the carrier proposing the construction. If that carrier has served or is serving the industries in the area, then the rule cannot come into play. This is true because otherwise it would be necessary to hold that the carrier is invading its own territory. Both the history of railroad transportation service at Boyce and the performance of such service by appellants, as revealed in the record (Tr. 100, 107, 130, 132-3, 140, 142, 143, 172, 194, 202), refute the conclusions reached by the Commission and the district court that the territory involved is new to them and that the proposed construction would be an invasion.

The discussion in *Texas & Pacific* indicates a clear purpose to prevent raiding of established traffic of one railroad by another through new track construction

which might result in injury to one by diversion of traffic, or to both through destructive competition. Such reasoning is wholly inapplicable here because appellants are already sharing the traffic in an existing competitive situation. Their services are provided by their own team track and also through reciprocal switching over Southern's facilities. Service through reciprocal switching is the equivalent of actual service by appellants, the Commission having so held in *Crossfield Ice Co.* v. *Southern Ry. Co.*, 232 I. C. C. 795 (1939), where it said:

> "Reciprocal switching is the service which carriers perform for each other within a switching district or other defined area, in connection with which service the switching carrier does not receive a line haul. *The effect of reciprocal switching is to extend the rails of the line-haul carrier to all designated tracks within the area.*" (p. 795, emphasis supplied.)

Under reciprocal switching the traffic moves to and from the industries on appellants' bills of lading and under their tariffs. Appellants pay Southern to perform the switching. Southern does not enter into the transactions with the shippers in any way; it is simply appellants' agent for the purpose of switching and delivery. *Missouri Pac.* v. *Reynolds-Davis*, 268 U. S. 366, 369 (1925); *Automobiles to Southern Ports for Export*, 225 I. C. C. 225, 229 (1937). Appellants are liable for loss and damage occurring during such switching operations. *Missouri Pac.* v. *Reynolds-Davis, supra;* [44 Stat. 1448, 49 U. S. C. 20 (11)].

They are responsible as the originating carrier for damages resulting from misrouting. *Ezee Flow Corp. v. Illinois Central R. Co.*, 287 I. C. C. 281, 284 (1952).

Consonant with such prior holdings, the Commission found that through reciprocal switching, one of the Boyce industries which at the time of the hearing remained in the Chattanooga switching district following Southern's unlawful act in removing the Boyce area therefrom,[8] "has the services of all lines entering that city. . . . The evidence is that 1,500 carloads of such traffic were routed via the applicants' [appellants'] lines in 1954" (Appendix B-6). It also said: "For a period of at least 35 years prior to June 23, 1954, the Boyce area was included in the Chattanooga switching limits, and all railroads entering Chattanooga had access to the industries in that area through reciprocal switching arrangements with the Southern" (Appendix B-12). And referring to Quaker Oats Company, the Commission found that "The plant has the services of all lines of railroad entering Chattanooga under reciprocal switching arrangements".[9]

Despite these findings and contradictory thereto, the Commission held that the Boyce industries are served "exclusively" by Southern (Appendix B-22).

Upon review the district court held that while the appellant Louisville and Nashville Railroad does "in the broadest sense of the term" serve all the Boyce industries, it is not now serving the involved territory

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[8]See footnote 6, p. 9, *supra*.

[9]Service by appellants' team track at Boyce, although established in the record, was not even mentioned by the Commission.

"in the sense in which the court used the word 'serve' in the Texas and Pacific case," and therefore, the area is new territory to the L. & N. The court deduced "from the facts in the Texas & Pacific case that the use of the word 'served' there comprehended serving by means of its own substantial facilities," *i. e.*, its own tracks (Appendix A-12).

This Court did not there circumscribe the meaning of the word "serve" as used in its expression "where the proposed trackage extends into territory not theretofore served by the carrier" (270 U. S. at p. 278). But if any limitation of that term was implied, it could not logically have been so narrowing as to mean only service rendered by a railroad over its own tracks because that would ignore the quintessence of the rule —the consequences of *new* competition.

In view of the foregoing, the holding by the Commission that the Boyce industries are served exclusively by Southern must be rejected as being irreconcilably inconsistent with its own findings and contrary to the facts. Likewise, the holding of the district court that the Boyce area is new territory to L. & N. merely because L. & N. does not have trackage to the industries, while at the same time recognizing competitive service by that railroad, is fatally affected by the same infirmity.

(B) COMPETITION IS NOT A FACTOR IN APPELLANTS' PROPOSAL BECAUSE THEY ALREADY ACTIVELY COMPETE AS AN ORIGINATING CARRIER FOR THE BOYCE TRAFFIC.

Avoidance of destructive competition is the heart of the opinion and rule in *Texas & Pacific*. All of the subsidiary considerations noted in that opinion are related to it. Resistance to new track construction invariably is initiated by other carriers fearing a loss of traffic through what they regard as an encroachment of their territory. Invasion of one railroad's territory by another necessarily implies injection of new competition and that competition, as it may affect the public interest, must be taken to be the controlling consideration underlying the decision in that case. It was the distinguishing factor in *Union Pac. R. Co.* v. *Denver & Rio Grande Western R. Co.*, 198 F. 2d 854 (C.A. 10, 1952), wherein the Union Pacific, in an effort to escape the *Texas & Pacific* rule, relied upon *Missouri, K. & T. R. Co.* v. *Texas & N. O. R. Co.*, 172 F. 2d 768 (C.A. 5, 1949), holding the trackage there considered to be a spur. The court rejected the latter case as support for Union Pacific's position, stating:

> "But *there a competitive condition already existed between the two companies,* and by the construction of the proposed trackage one of them desired to improve its position and in that manner further intensify the competition." (p. 859, emphasis suppied.)

This is the precise situation at Boyce.

Appellants, as an originating line-haul carrier, are in direct competition with Southern for all of the Boyce

industries' traffic, a large volume of which is already being handled by them (Tr. 141). That the proposed construction would not create any new competition or effect a raiding of Southern's traffic was recognized by the district court in its statement that under reciprocal switching "L. & N. in practical effect obtains much of the advantage it would have from building its own facilities into this area,"[10] and in the further statement that "in the absence of a subsisting reciprocal switching agreement by the terms of which the *L. & N. can compete on substantially even terms with the Southern* on shipments into and out of the area in question the Commission would have given favorable consideration to the application of the plaintiffs [appellants] for permission to build their own tracks" (Appendix A-13-14).

While Southern attempted in 1954 to rid itself of this competition by unlawfully removing three of the four new industries at Boyce from the Chattanooga switching district, prior to that time such competition always existed under reciprocal switching. Appellants' competitive status was restored when the Commission ordered reinstatement of the Boyce industries to the switching district.[11]

In view of these facts, the findings that the area is new territory to the L. & N. and that the proposed construction would bring about harmful competition

[10]The Commission has held that *reciprocal switching places all the railroads entering Chattanooga in competition* for the business of every shipper. *Financial Relations, etc., L. & N. R. R. Co.*, 33 I. C. C. 168, 201 (1915).

[11]See footnote 6, p. 9, *supra*.

are contrary to the evidence and should be set aside. The reasoning of *Texas & Pacific* and the rule emerging therefrom are clearly inapplicable here.

(C) THE FACTS AND CIRCUMSTANCES GIVING RISE TO THE RULE WERE ESSENTIALLY DIFFERENT FROM THOSE INVOLVED AT BOYCE AND CONSEQUENTLY FURNISH NO BASIS FOR APPLYING IT IN THIS CASE.

The rule of *Texas & Pacific* was framed to deal with a set of facts and circumstances entirely dissimilar to those in this case; yet the district court held this case to be controlled by that rule. Only contrasts can be found in the respective situations shown by the drawings in Appendix F[12] and by the facts here and those stated in that opinion and in the Commission's report in the subsequent proceeding wherein the proposed construction was authorized. *Construction by G., C. & S. F. Ry.*, 131 I. C. C. 393 (1927). The major differences, briefly outlined, are:

(a) Whereas the Santa Fe (the applicant there) had no branch line running near or in the direction of any part of the industrial district at West Dallas (270 U. S. 275), the Boyce area lies adjacent to the right of way owned by appellants, which is also occupied by Southern's main line under an easement granted by appellants. It is equally the territory of one as of the other to whatever extent proximity and direction of main line may bear upon the issues.

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[12]Drawing A in Appendix F is based upon appellants' map Exhibit H-1 in the certified record made before the Commission. Drawing B in Appendix F is based upon a map appended to the brief of Gulf, Colorado & Santa Fe Railway in the *Texas & Pacific* case and may be found in this Court's "Transcripts of Records and File Copies of Briefs", 1925, Volume 63; Case No. 417.

(b) The industries at West Dallas were well established and of long standing, the first having been located about 27 years prior to the decision (131 I. C. C. 394). At Boyce, however, the four industries involved are new in the area, only one of them having completed its plant construction at the time appellants filed their application with the Commission. The other three had not begun to move any traffic, and of these, the plant of one is still under construction (Tr. 128-130, 168).

(c) The sole object of the proposed trackage in the *Texas & Pacific* case was found by the Commission to be to reach the existing traffic at West Dallas (131 I. C. C. 400), while at Boyce appellants' object is to perform with its own facilities the services required for the transportation of traffic it is now handling through Southern as its agent.

(d) In *Texas & Pacific* all traffic available to the proposed line would have been diverted from the existing carrier (270 U. S. 276; 131 I. C. C. 396), whereas here the situation is altogether different since L. & N. is now handling the traffic to and from the industries as an originating carrier.

(e) There, no competitive railroad service to the industrial area was present, the industries being served exclusively by the Texas & Pacific Railway. All traffic moved out of the district over its line as the originating carrier. The reverse is true at Boyce where appellants are today, and continuously for many years have been, an originating carrier in active competition with Southern for the available traffic.

(f) The industrial district involved in *Texas & Pacific* was not within the switching limits of Dallas (131 I. C. C. at p. 397) and consequently reciprocal switching was not available to other carriers, and the industries there were served exclusively by the *Texas & Pacific*. But the Boyce area is and for more than 40 years has been within the Chattanooga switching district, and every industry located in that area is, for all transportation purposes, located on the line of the appellants.

The differences between the physical and geographical situations and between the essential aspects, including the controlling factor of existing competition, render the *Texas & Pacific* case wholly inapposite in determining the status of appellants' proposed trackage at Boyce.

2. The Proposed Trackage Is Established To Be a Spur or Industrial Track Within the Terms of Paragraph (22) of Section 1.

Guides other than the *Texas & Pacific* rule have been devised by various courts and by the Commission for determining whether given trackage is an extension of main line or an industrial lead. However, a rule of thumb which may be followed generally in distinguishing between the two is that extensions relate to *main line* as contrasted with *terminal facilities* which include spurs, side, team, and industrial tracks. *Missouri, K. & T. R. Co.* v. *Texas & N. O. R. Co.*, 172 F. 2d 768, 769 (C. A. 5, 1949).

Other matters which have been regarded as indicating the nature of given trackage include the following.

The proposed trackage will not provide any of the appurtenances needful and used in operating main or branch lines, that is, passenger, telephone, telegraph, station or station agent's service, or loading platforms and other buildings. *United States v. Idaho*, 298 U. S. 105 (1936); *Chicago, M. St. P. & P. R. Co.* v. *Chicago & E. I. R. Co.*, 198 F. 2d 8 (C. A. 7, 1952).

The length of the proposed construction—4.04 miles—is not such as to give it the nature of a branch line. Most of it is necessitated by appellants being blocked off by Southern's yard. In other cases tracks greater in length were held to be spurs. *United States* v. *Idaho, supra* (9 miles); *Jefferson County* v. *Louisville & N. R. Co.*, 245 S. W. 2d 611 (Ky., 1952), (5.75 miles).

The trackage will be used only for switching service incidental to line-haul movement a characteristic of spurs and industrial lead tracks. *Detroit & M. Ry. Co.* v. *Boyne City, G. & A. R. Co.*, 286 Fed. 540 (D. C., E. D. Mich., 1923); *Pennsylvania Railroad Co.* v. *Reading Company*, 132 F. Supp. 616 (D. C., E. D. Pa., 1955), affirmed, 226 F. 2d 958 (C. A. 3, 1955).

The cost of the project is reasonable in the light of traffic available (Ret. to Ques., Ex. E; Supplemental Ret. to Ques., pp. 5-7) and the track was requested by the shippers to give them needed service. *United States* v. *Idaho, supra; Chicago, M. St. P. & P. R. Co.* v. *Chicago & E. I. R. Co., supra; Pennsylvania Railroad Co.* v. *Reading Company, supra.*

The trackage will provide the supporting shippers with the same service as that accorded other industries similarly situated in the Chattanooga switching district. *Texas & Pac. Ry.* v. *Gulf, etc. Ry., supra; Chicago, Milwaukee, St. P. & P. R. Co.* v. *Northern Pac. R. Co.*, 120 F. Supp. 710 (D. C. W. D. Wash., 1954); *Pennsylvania Railroad Co.* v. *Reading Company, supra.*

While the proposed trackage would connect with four industries, the number involved apparently is of no significance. Cases holding trackage designed to serve several industries to be mere spurs or industrial leads are *Missouri, K. & T. R. Co.* v. *Texas & N. O. R. Co., supra; Chicago, M. St. P. & P. R. Co.* v. *Chicago & E. I. R. Co., supra.*

It is to be constructed to improve service to the shippers now being served by appellants through team track delivery and reciprocal switching. *Texas & Pac. Ry.* v. *Gulf, etc. Ry., supra.*

It will not provide a new route for transportation in interstate commerce. *Illinois Term. R. Co. Construction*, 290 I. C. C. 342 (1954); *Chicago, B. & Q. R. Co. Operation*, 282 I. C. C. 249 (1951); *Construction of Line by D. L. & W. R. R.*, 94 I. C. C. 541 (1925).

Judged by all of these considerations which have served as guides in the determination of the question involved, appellants' new trackage would be a spur or industrial track, just as Southern regards its tracks in the Boyce area, used for precisely the same purpose (Tr. 280-281). The latter were constructed without certificates of public convenience and necessity although

portions were completed as late as 1954 and 1955 (Exhibit H-9).

The track, being a mere spur or industrial lead, the Commission was without jurisdiction to pass upon the wisdom of the construction or its effect upon the public interest and, in accordance with *Powell v. United States*, 300 U. S. 276, 287 (1937), should have dismissed the application on that ground.

3. The Commission's Finding That the Proposal Would Be Inimical to the Public Interest and the District Court's Interpretation of That Finding Are Unsupported by and Contrary to the Evidence.

The record shows that there would be no diversion of traffic from Southern (Tr. 134, 151, 152); that the necessary expenditure for the construction would be reasonable in the light of available and prospective traffic (Ret. to Ques., Ex. E; Supplemental Ret. to Ques., pp. 5-7); that the construction would attract and encourage new industries to locate in the Boyce area—the only section of Chattanooga left open to heavy industrial development (Tr. 186, 190, 195); that it would provide a larger car supply, more direct routes to many destinations, and protection against breaks in continuity of service resulting from natural causes and strikes (Tr. 147-154). Yet, the Commission found that the construction "would be inimical to the public interest" (Appendix B-25). And the court interpreted this finding to mean that it would "jeopardize the stability of earnings of one or the other roads, make unlikely an

adequate return for one or the other on its investment or create such competition as would injure one of the two roads, and the harmful effect of such condition would 'be inimical to the public interest' " (Appendix A-10).

There are no facts in the record sustaining such a finding by the Commission or the interpretation thereof by the court. On the contrary, the only evidence as to these matters contradicts them. Being bare conclusions, unsupported by findings based upon facts of record, they must be held arbitrary and therefore erroneous.

4. Jurisdiction of the Commission Must Be Decided by the Court, Unhampered by Findings of the Commission, the Scope of Judicial Inquiry Into This Matter Being Unrestricted.

The district court stated: "The basic facts on which the jurisdictional question must be resolved are not in dispute. They are supported by substantial evidence and are therefore not subject to review by this court" (Appendix A-3).

Limitations, self-imposed by the courts, have been placed upon the scope of judicial review of administrative action in matters involving exercise of discretion committed by Congress to the Commission, a body possessing peculiar competence to deal therewith. This is not true of questions relating to the Commission's jurisdiction because jurisdiction is not a matter of discretion but rather one for judicial determination. The

distinction between the two kinds of questions is clearly drawn and explained at length in *Gt. No. Ry.* v. *Merchants Elev. Co.*, 259 U. S. 285 (1922).

Unquestionably, findings and conclusions of the Commission in matters involving the exercise of administrative discretion and expertise, supported by evidence reflected by the entire record and which are not unreasonable, arbitrary or capricious, are entitled to the great weight and respect which are accorded them upon judicial review. But whether the Commission has jurisdiction of the subject matter itself must be decided by a court based upon its own consideration of the facts bearing upon that issue. None of the cases dealing with this subject, known to appellants, suggests, much less holds, that a court is confined in any degree by findings and conclusions of the Commission as to its powers.

In this case jurisdiction rests upon whether appellants' proposed track would be an extension of line of railroad. The same question has frequently been decided by various courts without prior determination by the Commission. But the district court held that it could not review the facts relating to jurisdiction. It followed the argument of the appellees which was, in effect, that the court should emit a mere judicial echo of the administrative conclusion and in so doing it abdicated a judicial function.

Implicit in the cases dealing with the Commission's authority over track construction is a denial of any limitation on the scope of judicial review on that issue.

In *United States* v. *Idaho,* 298 U. S. 105 (1936), this Court held that taking of additional evidence on that question in the district court was not improper, saying, "whether certain trackage is a spur is a mixed question of fact and law *left by Congress to the decision of a court*—not to the final determination of either the federal or state commission" (p. 109). This statement was repeated in *Powell* v. *United States,* 300 U. S. 276 (1937), wherein it was said, "The decision of that question is for the court." In *Yonkers* v. *United States,* 320 U. S. 685 (1944), the Court cited these cases but held that the question should first have been considered by the Commission. It did not say, however, that upon review the court would in any way be inhibited by such prior action by the Commission. And in a dissent, not affecting this issue, it was repeated that such a determination by the Commission "does not foreclose an *independent* judicial judgment" (p. 693).

Where Congress has placed limits on the Commission's statutory powers it is the duty of the court on judicial review to determine those limits. *East Texas Lines* v. *Frozen Food Exp.,* 351 U. S. 49, 54 (1956). No agency may finally decide for itself the limits of its statutory power because that is a judicial function. *Social Security Board* v. *Nierotko,* 327 U. S. 358, 369 (1946). It follows that, if determination of the jurisdiction of the Commission is a judicial function and preliminary administrative conclusions on that issue are subject to independent judicial review, then that review necessarily must extend to an inquiry into all the facts as well as to an appraisal of the findings and

conclusions of the Commission. The holding of the district court that the facts bearing upon the jurisdictional question were not subject to its review is fundamentally erroneous.

CONCLUSION.

Appellants submit that the decision of the district court misapprehends the meaning and intention of the decision and rule in the *Texas & Pacific* case; that it misapplies the law as declared by this Court; and that the district court erroneously restricted the judicial function in its review of the action of the Commission herein, perpetuating unsupported findings of fact and erroneous conclusions of law made by that body in the first instance.

The questions involved are substantial in that they affect the right not only of appellants, but of all railroads, to provide necessary facilities to fulfill their duty to the public as common carriers. Upon these questions may depend the necessity for improvident anticipatory spur track construction by any railroad seeking to preserve its right to serve prospective industry along its right-of-way wherever proximity of another carrier threatens to deprive it of that right under the *Texas & Pacific* doctrine. Indiscriminate application of that doctrine would prohibit carriers from providing the shipping public with recognized advantages of competitive railroad services. Further, it is believed the extent of the Commission's authority over railroad track construction and the scope of

judicial review of administrative self-determination of that authority should be made more certain.

Respectfully submitted,

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PROOF OF SERVICE.

I, E. R. Leigh, one of the attorneys for appellants herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 7th day of February, 1958, I served copies of the foregoing Jurisdictional Statement on the several parties hereto, as follows:

1. On the United States, by mailing a copy in a duly addressed envelope, with air mail postage prepaid, to—

The Solicitor General
Department of Justice
Washington 25, D. C.

Victor R. Hanson, Esq.
Assistant Attorney General
Antitrust Division
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Washington 25, D. C.

Maurice A. Fitzgerald, Esq.
Attorney
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Washington 25, D. C.

2. On the Interstate Commerce Commission, by mailing a copy, in a duly addressed envelope, with air mail postage prepaid, to—

Robert W. Ginnane, Esq.
General Counsel
Interstate Commerce Commission
Washington 25, D. C.

Samuel R. Howell, Esq.
Associate General Counsel
Interstate Commerce Commission
Washington 25, D. C.

3. On Southern Railway Company, the Cincinnati, New Orleans & Texas Pacific Railway Company and Georgia Industrial Realty Company, intervening defendants, by mailing copies in duly addressed envelopes, with first class postage prepaid, to their respective attorneys of record, as follows—

Henry L. Walker, Esq.
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E. R. LEIGH

APPENDIX A

Opinion and Decision
Of the United States District Court,
Northern District of Georgia, Atlanta Division

in

State of Georgia, *et al.*, v. United States of America, *et al.*,
156 F. Supp. 711
(Decided October 21, 1957)

APPENDIX A.

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF GEORGIA,
ATLANTA DIVISION.

Civil Action No. 6063.

STATE OF GEORGIA,
WESTERN & ATLANTIC RAILROAD and
THE NASHVILLE, CHATTANOOGA & ST. LOUIS
RAILWAY, - - - - - - - - - *Plaintiffs,*

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, - - - *Defendants.*

This is a suit under Sections 1336, 1398, 2284 and 2321-2325, inclusive, Title 28 U.S.C.A., to set aside, suspend, annul and permanently enjoin the orders of the Interstate Commerce Commission, hereinafter referred to as the Commission, dated September 4, 1956, and February 12, 1957, in a proceeding entitled Nashville, Chattanooga & St. Louis Railway, et al., Construction, Finance Docket No. 18942, reported at 295 I. C. C. 363. The order of September 4, 1956, was accompanied by a report of the same date. The report and orders constitute the action of the Commission, the validity of which is challenged by this suit, and should be read and construed together. (Georgia Commission v. United States, 283 U. S. 765, 771.) Louisville & Nashville Railroad Company was substituted as plaintiff for the Nashville, Chattanooga & St. Louis Railway. The Southern Railway System and the Cincinnati, New Orleans and Texas Pacific Railway Company intervened on the side of the defendants.

The suit raises two questions. The first is whether the proposed new trackage sought to be built by plaintiffs in

the vicinity of Boyce, Tennessee constitutes an "extension of its line of railroad" which would thus give the Interstate Commerce Commission jurisdiction over the matter, and, if so, the second is whether the Commission's refusal to grant a certificate that the present or future public convenience and necessity requir or will require the construction of the trackage should be reversed.[1]

The answer to the first question is required by reason of the contention of the plaintiffs that the proposed trackage is not an "extension" under the terms of the Interstate Commerce Act but is rather "an industrial track" to be wholly constructed within a single state and thus is within the exemption provided in Section 1 (22).[2]

---

[1] 49 U. S. C. A. §1(18) provides:

"(18) After ninety days after this paragraph takes effect no carrier by railroad subject to this part shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this part over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this part shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment. Nothing in this paragraph or in section 5 shall be considered to prohibit the making of contracts between carriers by railroad subject to this part, without the approval of the Commission, for the joint ownership or joint use of spur, industrial, team, switching, or side tracks."

[2] 49 U. S. C. A. §1(22) provides:

"The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction . . . of spur, industrial, team, switching or side tracks, located or to be located wholly within one State . . ."

The basic facts on which the jurisdictional question must be resolved are not in dispute. They are supported by substantial evidence and are therefore not subject to review by this Court. Without our determining precisely what standard is to be applied by us as to the power of a court to set aside determinations of the Interstate Commerce Commission involving mixed questions of law and fact (cf. Gray v. Powell, 314 U. S. 402), we are faced with the necessity of determining whether under any theory of review the court should set aside the Commission's determination that it had jurisdiction over the subject matter by reason of its decision that the proposed new trackage constituted an "extension of the line" of the plaintiff railroad.

The facts, which may be found more fully developed in the order of the Commission cited above, are briefly as follows:

The area or territory here involved is a triangular tract of land whose base is formed by the mainline tracks of plaintiffs, hereinafter usually referred to as the L & N, and a Southern Railway System subsidiary, Cincinnati, New Orleans and Texas Pacific Railway Company (hereinafter called the Southern), just on the edge of the city limits of Chattanooga, Tennessee. The two sides of the triangle are formed by the Chickamauga Creek on the right or the northeast side, and the Tennessee River on the left or southwest side. The tract is approximately 2½ miles wide at the base and approximately 1½ miles across from the base to the apex. The tracks of the plaintiffs were constructed in the middle of the last century and those of the Southern were, by permission, constructed on the plaintiffs' right-of-way at a later date. The later tracks are to the north of those of the plaintiffs and thus physically stand between the plaintiffs' line and the triangular area. Many years ago the Southern extended a switching or industrial track along

the right or northeast side of the triangle to serve several small industries in the area. This is called the "river track." It also, in 1952, built a switch or industrial track along the left or southwest side of the triangle for a short distance to serve a new industry, the Quaker Oats Company. This track extends not from the main line of the Southern but from its switching yard, which at the western end of the base of the triangle effectively blocks access from the plaintiffs' tracks to this area. For some 35 years prior to June 1954 this entire territory, known as the Boyce area, was in the Chattanooga switching district under reciprocal switching arrangements to which the plaintiffs and the Southern were parties. The Southern handled all cars of the L & N to all industrial side tracks in the area for a flat switching charge. This charge was absorbed by the L & N and was not added to the freight charges paid by shippers, who had the benefit of the Chattanooga tariffs.

The construction of river improvements on the Tennessee River gave new and added value to the Boyce tract for industrial sites. Permanent relief from overflow of the area came subsequent to 1939. The construction of Quaker Oats Company signalized the first major recognition of this new factor. Three other industries which the plaintiffs' proposed new trackage is designed to serve are located or are to be located on the Southern's river track previously mentioned, which is at the opposite end of the area. These are all potentially substantial users of rail transportation. The L & N has at all times maintained a team track in the vicinity of Boyce at which it has served such shippers as could advantageously use such facilities. The maximum annual car loadings prior to the advent of the Quaker Oats Company from the entire area were negligible. The anticipated car loadings from the presently existing and projected industries are very substantial. Estimates of gross freight revenues anticipated by the plaintiffs from all the industries

ncrease from $685,867 for the first year, to $1,072,906 the ifth year of operation. The estimated cost of the new rackage is $523,916.00.

In June 1954 the Southern issued new proposed tariffs vhich removed the northeasterly portion of the Boyce area, ncluding all of the new industries except the Quaker Oats Company from the Chattanooga switching district. This nabled the Southern to receive in lieu of the prevailing switching charge a substantially higher charge for the service, which the Commission found to be about 20% of the otal revenues on line-haul traffic moved by the L & N between their yards in Chattanooga and points throughout he country. This arrangement by the Southern was challenged by a complaint filed with the Commission by the Central of Georgia Railway and others.[3]

The matters involved in that complaint were determined by the commission in its report and order dated May 4, 1956. The effect of the Commission's order was to require the reestablishment of reciprocal switching in the Boyce area effective August 27, 1956. This order of the Commission was attacked by the Southern Railway System which filed suit in the United States District Court for the Eastern District of Virginia. That Court has recently dismissed hat suit and declined to interfere with the order of the Commission. Southern has announced its intention to appeal his judgment in order, if possible, to prevent the reestabishment of reciprocal switching arrangement in the Boyce rea.

The proposed new trackage would leave the main line f the L. & N at a point south of the eastern side of the riangular territory, proceed northerly and cross by an

[3]I. C. C. Docket No. 31737, Cramet Inc. v. Alabama Great outhern Railroad Company, et al., consolidated with I. C. C. No. 1677; Central of Georgia Railway v. Cincinnati, New Orleans & Texas Pacific Railway, and I. & S. No. 6284, Rutile Ore—Gulf and outh Atlantic Ports, heard on June 7, 1955.

overhead bridge the main line of the Southern. It would parallel the Southern river track where it serves the three industries along the Chickamauga Creek and then turn southwesterly across the untapped midsection of the territory for approximately two miles to the plant of Quaker Oats Company.

After plaintiffs filed their application with the Commission for the certificate of public convenience and necessity, they filed a motion to dismiss based on their contention that such certificate was not required under the statute because, so they contended, the proposed trackage was an industrial track rather than an extension of line. The Commission held hearings on the motion as well as on the merits. It entered its order finding that the proposed trackage was an "extension" as contemplated in Section 18 of the statute, and that thus the Commission had jurisdiction in the matter. It also found that the present and future public convenience and necessity were not shown to require the construction.

There is an authoritative guide to aid the Commission and the courts in determining whether additional trackage is an "extension" of the line of the carrier or is a "spur, industrial, team, switching or side track(s)." After discussing the congressional policy expressed in the Transportation Act the Supreme Court said in Texas & Pacific Rwy. Co. v. Gulf C. & S. F. Rwy. Co., 270 U. S. 266:

> "If the purpose and effect of the new trackage is to extend substantially the line of a carrier into new territory, the proposed trackage constitutes an extension of the railroad, within the meaning of paragraph 18, although the line be short and although the character of the service contemplated be that commonly rendered to industries by means of spurs or industrial tracks."

Thus we find the critical words are "substantially" and "new territory." The first is of course an indefinite word, but it is one whose meaning can be made more definite by reference to the other language in the opinion. "New territory" is also an indefinite expression when applied to a situation where, as here, the applicant carrier's tracks actually impinge upon but do not penetrate the area involved. This term, too, is made more meaningful by other language of the court's opinion.

In the Texas Pacific case, the Santa Fe commenced constructing new trackage of approximately 7½ miles from a junction on the opposite side of the city of Dallas, Texas, from an industrial area already served by main line and industrial tracks of the Texas Pacific; by air line the nearest tracks of the Santa Fe were some 3½ miles from the area. It was clear that the purpose of this new construction was to tap the rich industrial area and not to serve existing industries along the new line. The cost of the proposed trackage was some half million dollars, certainly quite a substantial sum in 1925. The Texas Pacific sought to enjoin the construction because the Santa Fe had not obtained the certificate from the Commission. The latter road defended on the ground that this was an "industrial track" and not an "extension" of its line. Notwithstanding there was an absence of many of the characteristics of an extension, e.g., express and passenger service, ticket and freight agents, telegraph service, the creation of new routes, and notwithstanding there were present some characteristics of industrial tracks, e.g., an unballasted road, light weight rails, service on a switching basis rather than for additional charge to the shipper from the junction point and the handling exclusively of car load freight, nevertheless the trial court held that this was an extension. The Court of Appeals reversed and the Supreme Court granted certiorari. In its opinion the court first laid down a rule of

construction of the same words with which we are here concerned. Since, in our view of the matter they control our decision in this case, we quote fully the statement and also the reasoning and conclusion reached by the court:

"In support of its contention that the proposed line constitutes an industrial track, the Santa Fe cites instructions differentiating branches from spurs, which are given by the Interstate Commerce Commission in forms long prescribed for accounting purposes. It points also to uses made of these terms in other connections by courts, by the Commission, and by state legislatures. A truer guide to the meaning of the terms extension and industrial track, as used in paragraphs 18 to 22, is furnished by the context and by the relation of the specific provisions here in question to the railroad policy introduced by Transportation Act, 1920. By that measure, Congress undertook to develop and maintain, for the people of the United States, an adequate railway system. It recognized that preservation of the earning capacity, and conservation of the financial resources, of individual carriers is a matter of national concern; that the property employed must be permitted to earn a reasonable return; that the building of unnecessary lines involves a waste of resources and that the burden of this waste may fall upon the public; that competition between carriers may result in harm to the public as well as in benefit; and that when a railroad inflicts injury upon its rival, it may be the public which ultimately bears the loss. See Railroad Commission v. Chicago, Burlington & Quincy R. R. Co., 257 U. S. 563; The New England Divisions Case, 261 U. S. 184; The Chicago Junction Case, 264 U. S. 258; Railroad Commission v. Southern Pacific Co., 264 U. S. 331. The Act sought, among other things, to avert such losses.

"When the clauses in paragraphs 18 to 22 are read in the light of this congressional policy, the meaning and scope of the terms extension and industrial track become clear. The carrier was authorized by Congress

to construct, without authority from the Commission, 'spur, industrial, team, switching or side tracks . . . to be located wholly within one State.' Tracks of that character are commonly constructed either to improve the facilities required by shippers already served by the carrier or to supply the facilities to others, who being within the same territory and similarly situated are entitled to like service from the carrier. The question whether the construction should be allowed or compelled depends largely upon local conditions which the state regulating body is peculiarly fitted to appreciate. Moreover, the expenditure involved is ordinarily small. But where the proposed trackage extends into territory not theretofore served by the carrier, and particularly where it extends into territory already served by another carrier, its purpose and effect are, under the new policy of Congress, of national concern. For invasion through new construction of territory adequately served by another carrier, like the establishment of excessively low rates in order to secure traffic enjoyed by another, may be inimical to the national interest. If the purpose and effect of the new trackage is to extend substantially the line of a carrier into new territory, the proposed trackage constitutes an extension of the railroad within the meaning of paragraph 18, although the line be short and although the character of the service contemplated be that commonly rendered to industries by means of spurs or industrial tracks. . . . ."

Texas & Pac. Rwy. v. Gulf, etc., Ry., 270 U. S. 266, 277, 278.

Thus we find that though the court finally made the test the *substantial* extension into *new territory*, much meaning was given to these words by the court's statement of the purpose of the statute. We think it clear that if the proposed construction offers a substantial threat to a "preservation of the earning capacity, and conservation of the financial resources" of either the proponent of the new

trackage or of the existing carrier it may become "a matter of national concern"; if there is a substantial doubt that "the property employed" (and this must mean the property employed by both the new and the old carriers) will "earn a reasonable return," or that it constitutes an unneeded duplication and that 'the building of unnecessary (i.e., duplicating) lines involves a waste of resources" whose burden "may fall upon the public"; and if the type of competition that would result "may result in harm to the public as well as in benefit," or that the injury to its rival may cause the public ultimately to bear the loss then the Act sought, among other things, to avert such results. This is the clear teaching of the Texas Pacific case.

In its conclusions and findings the Commission said:

> "Measured by the standard of service ordinarily performed by railroads throughout the country, we believe that the record supports a conclusion that the service accorded by the Southern to the industries in the Boyce area is adequate to meet all the reasonable traffic demands of those industries and, under that circumstance, the proposed extension, costing over one-half million dollars, would be an expenditure of money not in furtherance of the national transportation policy, and would be inimical to the public interest."

This, it seems to us, is a finding of the following facts:

1. Present service is ample for both shippers and the public.

2. The proposed construction would be a duplication of facilities.

3. Such duplication would be an unnecessary expenditure of substantial size not in furtherance of the national transportation policy because it would either jeopardize the stability of earnings of one or the other roads, make unlikely an adequate return for one or the

other on its investment or create such competition as would injure one of the two roads, and the harmful effect of such condition would "be inimical to the public interest."

We think that when such facts are found by the Commission based on substantial evidence on the record as a whole[4] we may not set them aside. It is clear here that these findings are supported by the evidence. Although these findings were made by the Commission in connection with the merits of the application for certificate of convenience and necessity they stand in the record for whatever purpose they may serve on the jurisdictional question as well. We are unable to avoid the conclusion that findings that the proposed expenditures would merely duplicate present facilities and that such unnecessary duplication would be inimical to the public interest has a bearing on our determination of what is a substantial extension into new territory. It is *new territory* to the L & N because the L & N is not now serving it in the sense in which the court used the word "serve" in the Texas and Pacific case or in the sense in which the Southern is now serving it. It is a *substantial* extension because it involves substantial expenditures and runs a substantial distance. We think that the building of new tracks of significant mileage comes within the jurisdiction of the Commission when it involves a substantial expenditure of funds to duplicate existing adequate facilities to tap an area of industrial potential which it cannot now serve from its own facilities if such expenditure or the competition resulting therefrom might be a burden on the public. This is such a case.

The L & N argues that this territory cannot be new to it because it has always held itself out to serve the area

[4] 5 U. S. C. A. §1009(e). Universal Camera Corp. v. N. L. R. B., 340 U. S. 474

both by the presence of its main line, and the team track (which is all that was needed for a century) and because of the reciprocal switching arrangement between it and the Southern. The fact remains that the L & N does not consider this service adequate; otherwise it would accept the status quo and not now seek to spend a half million dollars to push its track into the area. Moreover plaintiffs do not take the position that the mere existence of a reciprocal switching agreement constitutes such service as would prevent any area covered thereby from becoming a new territory as to a connecting carrier. Since the reciprocal switching agreement does in the broadest sense of the term result in the L & N "serving" all the industries that are on the Southern's industrial track within the switching area, this is an implied admission that the term "serve" in Texas & Pacific means something more than the type of service that is here furnished by it.[5]

We deduce from the facts in the Texas & Pacific case that the use of the word "served" there comprehended serving by means of its own substantial facilities which would be expensive to duplicate. In that sense the L & N cannot claim that it is now "serving" the territory and hence it is not new to it.

Our attention is called by the plaintiffs to the decision by the Court of Appeals for the Fifth Circuit in Missouri K.&T.R. Co. v. Texas & N.O. R.R. Co. (5 Cir.), 172 F. 2d 768, and Pennsylvania Railroad v. Reading Co., 132 F. Supp. 616, aff'd. (3 Cir.), 226 F. 2d 958. The Court held in the first of these cases that new trackage costing only $30,000 to $40,000 extending approximately a mile into an industrial area as to which both roads had been in steadily extending

[5]We think it appropriate to assume in this discussion that the reciprocal switching agreement is still in force, for undoubtedly the Commission assumed this during the proceedings before it. The Commission's action requiring its continuance now stands unreversed, although on appeal in court.

competition through the construction of switch and industrial tracks, was not an "extension" within the Act. In the Reading case the Court held that where both roads had for years parallel lines on opposite sides of the Schuykill River and both repeatedly crossed the river to reach industrial sites, the building of a track and bridge 1700 feet long across the river to reach a single power plant to furnish it a type of service it could not then get from the other road was only an industrial track or spur even though it would cost a very substantial sum.

We have considered these and the other cases cited by the plaintiffs in support of their contentions that we should determine on the record that this is not an extension of the line of the L & N. In light of the finding of the Commission of the basic facts set out above we do not believe that this case is controlled by any of them. We conclude therefore that the Commission had jurisdiction.

What has already been said also requires us to deny the relief sought by the plaintiffs on the merits. The granting or denial of such a certificate is a power given to the Interstate Commerce Commission, and if on substantial evidence the Commission makes its determination that the present and future public convenience and necessity do not require the proposed service the courts do not reverse in the absence of legal error contributing to the Commission's decision. Here we find that the basic facts heretofore outlined are sustained by the record and no legal error appearing the decision of the Commission must stand.

We have heretofore adverted to the present status of the reciprocal switching agreement whereby the L & N in practical effect obtains much of the advantage it would have from building its own facilities into this area. The court considers the status of this agreement quite relevant to the merits of this controversy. We think it well within the realm of the possible that in the absence of a subsisting

reciprocal switching agreement by the terms of which the L & N can compete on substantially even terms with the Southern on shipments into and out of the area in question the Commission would have given favorable consideration to the application of the plaintiffs for permission to build their own tracks. In commenting on this the Commission said:

> "Witnesses for the industries in the Boyce area have not seriously disputed the adequacy of the Southern's service, and their testimony indicates that they want another line of railroad primarily for bargaining purposes. The industries served by the Southern's river track support the application almost entirely for the reason that they are not accorded reciprocal switching. Practically all of their existing difficulties, including adequate transit privileges, will be satisfied if they are accorded reciprocal switching, and that matter is before the Commission and will be determined in an appropriate proceeding."

It has now been determined by the Commission that the reciprocal switching arrangement must be continued and, thus, in the view of the Commission, most of the need for the L & N's service would be satisfied so far as the industries are concerned. Alternatively, if the Supreme Court should reverse the Commission's order restoring reciprocal switching, then quite a different situation would exist from the standpoint of both shippers and competing carriers.

We therefore deny the relief here sought by plaintiffs only in the present state of the records in the two cases. This denial is not conditional, but it is without prejudice to the right of the plaintiffs to present anew their application to the Commission for certificate authorizing them to build the proposed extension in the event that the reciprocal switching agreement now ordered in effect by I. C. C. Docket No. 31737 is later terminated either by the court or by action of the Commission itself.

The prayers of the complaint are DENIED and the complaint is DISMISSED.

This 21st day of October, 1957.

Elbert P. Tuttle,
United States Circuit Judge.

Frank A. Hooper,
United States District Judge.

Boyd Sloan,
United States District Judge.

Filed in Clerk's Office
Oct 21 1957

C. B. Meadows, Clerk
By RD
Deputy Clerk

APPENDIX B

Report of
Interstate Commerce Commission
in Finance Docket No. 18942

Nashville, Chattanooga & St. Louis Railway,
et al., Construction
295 I.C.C. 363
(Decided September 4, 1956)

APPENDIX B.

[295 I.C.C. 363] **[363]**

INTERSTATE COMMERCE COMMISSION

FINANCE DOCKET NO. 18942

NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY ET AL. CONSTRUCTION

Decided September 4, 1956

1. Motion to dismiss the application for want of jurisdiction, overruled.
2. Present and future public convenience and necessity not shown to require construction and operation by the Nashville, Chattanooga & St. Louis Railway and the Western & Atlantic Railroad of a line of railroad in Hamilton County, Tenn.

E. R. Leigh, William A. Miller, W. D. Spears, and *Prime F. Osborn* for applicants.

E. Freeman Leverett and *Robert W. Burchmore* for interveners in support of the application.

Sidney S. Alderman, James A. Bistline, and *Phil B. Whitaker* for interveners in opposition to the application.

REPORT OF THE COMMISSION

DIVISION 4, COMMISSIONERS MITCHELL, WINCHELL, AND HUTCHINSON

BY DIVISION 4:

Exceptions to the report proposed by the examiner were filed by the applicant and the interveners favoring the proposal. Briefs were filed and the case has been argued orally.

The Nashville, Chattanooga & St. Louis Railway and the Western & Atlantic Railroad, on May 27, 1955, filed a

joint application under section 1 (18) of the Interstate Commerce Act, as amended, in which authority was sought to construct and operate a line of railroad, extending in a general southwesterly direction from a point on the main line of the latter, at milepost 130.35, near the village of Boyce, to the plant site of the Quaker Oats Company, approximately 4.04 miles, in Hamilton County, Tenn. The State of Georgia and an industry known as Cramet, Inc., intervened in support of the application. The Southern Railway Company and two of its subsidiaries, The Cincinnati, New Orleans and Texas Pacific Railway Company and the Georgia Industrial Realty Company, intervened in opposition to the application. All points mentioned herein are in the State of Tennessee unless otherwise designated. As hereinafter sometimes used, the term "applicant" will have reference to the Nashville, Chattanooga & St. Louis Railway, and the term "Southern" will be used [364] synonymously with the Cincinnati, New Orleans & Texas Pacific Railway Company.

On September 15, 1955, the applicant filed a motion to dismiss the application on the ground that the line proposed to be constructed would be a spur, industrial, or switch track, falling within the exemption provided in section 1 (22) of the act. The Southern filed a reply thereto. By order dated September 23, 1955, consideration of the motion was deferred pending full hearing on all the facts relating to the application. A hearing was held at Chattanooga on October 3, 4, and 5, 1955.

General Description of Applicant's Lines.

The Nashville, Chattanooga & St. Louis Railway is a subsidiary of the Louisville & Nashville Railroad Company which, in turn, is controlled by the Atlantic Coast Line Railroad Company. It operates approximately 1,043 miles of railroad as a component part of the Coast Line system.

Its railroad consists of a main line, extending easterly from Memphis, through Nashville and Chattanooga, to Atlanta, Ga., and various branch lines, one of which extends to Paducah, Ky., and Ohio River crossings in the northwest, and another to Gadsden, Ala. Connections for interchange of traffic are made with the Southern at Chattanooga. It has numerous connections with other carriers in the territory served by it, including the Illinois Central Railroad Company, to the west. An application is pending with us, filed in Finance Docket No. 18845, in which authority is sought to merge the properties of the applicant into those of the Louisville & Nashville Railroad Company.

Western & Atlantic Railroad

The Western & Atlantic Railroad was constructed many years ago by the State of Georgia, and its properties are still owned by that State. Its line of railroad extends southerly from Chattanooga to Atlanta, Ga., 136 miles, and the care of its railroad properties is exercised by the Georgia Public Service Commission, pursuant to acts of the General Assembly of the State. Its railroad has been operated under lease by the applicant since 1890 and constitutes the applicant's main line between the above-named points. The present lease will expire by limitation in 1969. The portion of the right-of-way of the Western & Atlantic Railroad extending from Boyce southwesterly to Chattanooga, approximately 5.5 miles, is jointly occupied by parallel lines of the applicant and the Southern. Years ago, the State of Georgia granted the Cincinnati Southern Railway easement rights to construct a portion of its line on that section of the right-of-way. The properties of the latter are owned by the city of Cincinnati, but they are leased to and operated by the Southern.

[365] PURPOSE OF PROPOSED LINE AND DESCRIPTION OF TERRITORY

The village of Boyce is just outside the northeasterly limits of the city of Chattanooga. The point of connection between the applicant's proposed line and its main line is in the vicinity of Boyce, about 2,000 feet beyond the northeasterly boundary line of the city and about 5.5 miles from the applicant's freight station in the city. The Southern and the applicant once maintained a joint agency station at Boyce, but the latter discontinued the use of it many years ago. The purpose of the applicant's proposed line is to reach new industries located or to be located in a territory referred to as the Boyce industrial area, or Boyce area. As delineated on maps submitted in evidence, the boundary lines of this area resemble the sides of an obtuse triangle, the base of which is formed by the parallel main lines of the applicant and the Southern, previously described, for a distance of about 2.5 miles. The northeasterly side is bounded by the Chickamauga Creek and the southwesterly side by the Tennessee River. The vertex of this triangle is about 1.3 miles north of Boyce, at the confluence of those streams. As above indicated, most of the area is within an outward bend of the river and formerly was subject to periodic overflow. However, that situation was overcome gradually through construction by the Tennessee Valley Authority of certain flood control dams on the Tennessee River. Permanent relief from overflow of the area came in 1939, when the so-called Chickamauga dam was completed. From time to time thereafter, the Southern, through its subsidiary, the Georgia Industrial Realty Company, purchased much of the land for industrial purposes. Since September 1952, it has acquired 765 acres at a total cost of $1,172,842.

Old Industries in the Area

Although much of the Boyce area was undesirable for the location of industries prior to the advent of flood control, it appears that for many years 4 or 5 small industries have been operating in the extreme northeasterly part of the area, in the vicinity of Chickamauga Creek. They are engaged in the manufacture of such products as wooden handles, heaters, fireplace fixtures, et cetera. Rail service to these industries is afforded by the Southern over a spur track which it built over 50 years ago. This spur, known as the river track, extends northwesterly from a connection with the Southern's main line, at or near Boyce station, to a point on the Tennessee River near the mouth of Chickamauga Creek, approximately 1.3 miles. The volume of traffic handled by the Southern for all such industries is comparatively small, and they have shown no interest in this proceeding.

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New Industries in the Area

Quaker Oats Company.—In the early part of 1952, the Quaker Oats Company completed the construction of a plant for the manufacture of cornmeal, hominy grits, corn oil, corn seed ingredients, et cetera, and for use as a distribution center to southeast territory, at a cost in excess of $1 million. A feed mill also is under construction for the manufacture of mixed animal and poultry feed. The plant is located in the extreme southwesterly part of the Boyce area and is served by the Southern through means of a spur track leading from its Citico yard, a distance of about 0.75 mile. This spur constitutes the plant's only rail outlet, but it has access to the Tennessee River. It is within the switching district of Chattanooga and has the services of all lines entering that city under reciprocal switching arrangements published in the tariffs of various carriers.

The volume of the plant's inbound and outbound traffic is not specifically shown, but the evidence is that 1,500 carloads of such traffic were routed via the applicant's lines in 1954, and that the total volume to be handled by both the applicant and the Southern would be approximately 5,000 carloads in 1955.

The other three industries which the applicant's proposed line is designed to serve are the Central Soya Company, Heavy Minerals, Inc., and Cramet, Inc. Their plants are located, or are to be located, on the Southern's river track, previously mentioned, which is at the opposite end of the area about 2 miles northeast of the plant of the Quaker Oats Company.

Central Soya Company.—The Central Soya Company is engaged in the manufacture of soybean meal and oil, crude lecithin, and mixed feeds for livestock and poultry. It is also engaged in merchandising grain. In addition to the rail outlet afforded by the Southern's river track, it is served by river barges. Construction of its plant, costing approximately $7 million, was commenced in June 1954 and, at the time of the hearing, was scheduled for completion in November 1955. Partial operation began early in 1955. According to estimates made by a witness for the company, the inbound rail traffic will consist of 70,000 tons of feed ingredients, 1,150 tons of bags, and 48 tank cars of hexane solvent, and the outbound rail traffic will consist of 67,500 tons of soybean meal and 1,000 tank cars of crude soybean oil annually. Most of the plant's transportation requirements will be met by means of transportation other than railroad. The witness estimates that 6 million bushels of grain, largely corn, and 6 million bushels of soybeans will be brought in by barge annually, and that 4 million bushels of grain will be shipped out by truck. About 95 percent of all the soybeans and grain processed at the plant is received by barge. The witness states, in effect, that it

would be as convenient to ship by truck as by rail and that if the Southern does not reduce its frieght [367] rates on the company's commodities to meet the cost of trucking, or reestablish reciprocal switching in the Boyce area, the latter will resort to the use of trucks for the movement of a substantial volume of its outbound traffic.

Cramet, Inc.—Cramet, Inc., a subsidiary of the Crane Company, of Chicago, Ill., is engaged in the manufacture of titanium sponge and ingots, and various chlorides. The plant, located on or near the Southern's river track, about midway between its termini cost more than $25 million, including Federal aid. Partial production began in January 1955. The entire finished products of the plant are required by the United States Government for aircraft production and other national defense uses. Its raw material inbound consists largely of rutile ore imported from other countries. About 80 percent of its finished products are shipped out by rail and the remainder by truck. The destinations are not shown for reasons of military secrecy. Under normal production, which the plant hopes to reach sometime soon, the annual volume of traffic is expected to be 56,510 tons inbound and 11,869 tons outbound.

Heavy Minerals Company.—Heavy Minerals Company, also a subsidiary of the Crane Company, and which is designed to process heavy minerals and chemicals, contemplates the construction of a plant on a tract of land adjoining that of Cramet, Inc. It is still in the planning stages. The estimated cost of construction is shown to be $5 million, including Federal aid. No further details of the proposed plant are shown of record because of military secrecy.

The Southern has constructed certain tracks and so-called turnouts to connect with the industrial tracks of the new industries at a total cost of $92,906.

Present Service to the Industries

All rail traffic moving to and from the industries in the Boyce area is handled through the Southern's Citico freight yard which is located in the extreme southwesterly end of the area, close to the plant of the Quaker Oats Company. This yard recently was remodeled and expanded by the Southern at a cost of about $15 million, and is one of the most modern freight yards in the United States. Normal operation of the yard is performed 7 days a week by 12 engine crews, 4 of which are engaged during each 8-hour shift. Additional crews are sometimes required. Switching service between the Citico yard and the industries in question is performed by means of engines from the Citico yard, operated by yard crews. Service to the plant of the Quaker Oats Company is performed 6 days a week, during the hours between midnight and 7 a. m. The company requested that the service be performed during those hours to avoid interference with plant operations during working hours between 7 a. m. and midnight.

[368] Switching service to the plant of the Central Soya Company, and other plants served by the Southern's river track, is performed by a yard-engine crew which delivers loaded and empty cars to the plants from the Citico yard and brings back loaded cars to that yard for outbound movement. Extra switching service is sometimes performed. The Southern stands ready to perform special switching service to any of the industries that request it.

Methods of Handling Interchange Traffic Between Yards

Outbound freight traffic from the industries in the Boyce area is interchanged between the Southern and the applicant at the latter's freight yard, known as the Craven yard, which is located in Chattanooga about 7.5 miles south

of the Southern's Citico yard. The Southern switches such traffic from its Citico yard to the applicant's Craven yard. Conversely, inbound traffic handled by the applicant for the industries is switching by the applicant from its Craven yard to the Southern's Citico yard. The Tennessee, Alabama & Georgia Railway Company and the Central of Georgia Railway Company also have interchange connections with the Southern at Chattanooga, and the traffic handled by those carriers for the industries is switched to and from the Citico yard in a similar manner. The Southern makes two deliveries a day to each of the above-named carriers. In turn, the applicant and the Central of Georgia Railway each makes 2 deliveries a day to the Southern, but the Tennessee, Alabama & Georgia Railway makes only 1 delivery.

Freight Train Service Afforded by the Southern to Chattanooga

Describing the main-line freight service performed by the Southern to and from Cattanooga, the general manager of the western lines of the Southern system testified substantially as follows:

> "The Southern system has an average of 7 freight trains daily, northbound out of Citico yard, in the direction of Cincinnati; 3 of these trains, when they reach Danville, Ky., go to Louisville and connections, and 2 of them go on beyond Louisville to St. Louis. There is an average of 4 or 5 freight trains a day that move out of Citico yard, directly to Cincinnati, and make connections there. The same service is performed in the reverse direction. There is an average of 4 freight trains a day in each direction between Chattanooga and Knoxville; an average of 4 freight trains a day between Chattanooga and Jacksonville, Fla., via Atlanta and Macon, Ga.; an average of 3 freight trains a day in each direction between Chatta-

nooga and New Orleans, La., via Birmingham, Ala.; and an average of 3 freight trains a day in each direction between Chattanooga and Memphis."

Location of Applicant's Proposed Line

As previously indicated, the applicant's main line passes along the southeastern boundary of the Boyce industrial area, and from [369] that point to Chattanooga, 5.5 miles, it parallels the main line of the Southern. The applicant cannot construct a railroad to reach the industries in question without crossing the main line of the Southern. In other words, the Southern has the "inside track" next to the industrial area. The proposed line would connect with the applicant's main line at milepost 130.35, a point about 2,000 feet northeast of the boundary line of the city of Chattanooga and would cross the main line of the Southern near that point by means of an overhead bridge. It would extend northwesterly from this bridge for a distance of about 1.75 miles, roughly paralleling the Southern's river track, to the plant facilities of the Central Soya Company, thence southwesterly, about 2 miles farther, to the plant facilities of the Quaker Oats Company. The applicant has instituted condemnation proceedings in court to acquire the necessary right-of-way, much of which is designed to traverse land specifically acquired by the Southern for the location of prospective industries. In addition to the main-line crossing, referred to above, the proposed line would cross the Southern's river track and certain spur or industrial tracks, at grade, within the Boyce industrial area. It would also cross certain highways.

Physical Characteristics of Proposed Line and Cost of Construction

The proposed line would be a single-track standard-gage railroad, laid with 90-pound rail. The maximum grade is to be 1.38 percent toward the main line and 1.70 percent in the

opposite direction, compensated for curvature. The average rate of curvature per mile would be 78° 45′. It is estimated by applicant that the charges to road account for maintenance would be about $6,250 a year for the first 5 years of operation. The applicant has submitted a statement showing estimated costs of the various items involved in the proposed construction. The total cost of construction would be $523,916. Construction would be commenced immediately upon our authorization and completed within 8 months. Funds are now available to meet such costs. The applicant would not require any additional equipment for operating purposes.

ESTIMATED VOLUME OF TRAFFIC AND REVENUES

Estimates of the volume of traffic which the applicant expects to acquire in event of the proposed construction were based upon information furnished to it by the industries. These estimates, for the year 1956, are as follows: [370]

Industry	Tons of freight	Gross freight revenues
Quaker Oats Company	43,111	$ 219,868
Central Soya Company	77,282	239,952
Cramet, Inc.	31,905	200,519
Heavy Minerals, Inc.	6,975	25,528

Estimates covering the combined freight traffic and revenues anticipated by the applicant from all the above-mentioned industries for each of the first 5 years of operation of the proposed line are shown as follows:

Period	Tons of freight	Gross freight revenues
Year 1956	159,273	$ 685,867
Year 1957	178,986	763,426
Year 1958	225,997	932,444
Year 1959	245,773	1,008,496
Year 1960	257,593	1,072,906

After deducting railway operating expenses, railway tax accruals, hire of equipment, and joint facility rents from the gross freight revenues, the applicant shows that the net railway operating income from operation of the proposed line would be $158,052 in 1956, $175,963 in 1957, $214,877 in 1958, $232,395 in 1959, and $247,260 in 1960.

Reciprocal Switching in the Boyce Area

For a period of at least 35 years prior to June 23, 1954, the Boyce area was included in the Chattanooga switching limits, and all railroads entering Chattanooga had access to the industries in that area through reciprocal switching arrangements with the Southern. The Southern performed all such switching, and charges therefor were absorbed by the participating carriers. The prevailing charge for switching to and from the plant of the Quaker Oats Company, which is the only industry that continues to have reciprocal switching privileges in that area, is at the rate of $12.73 per loaded car. Pursuant to tariff publication,[1] on the last-mentioned date, the industries served by the Southern's river track in the northeasterly portion of the Boyce area, including the Central Soya Company, Cramet, Inc., and Heavy Minerals, Inc., were removed by the Southern from the Chattanooga switching district. This action enabled the Southern to receive, in lieu of the prevailing switching charge, a division of about 20 percent of the total revenues on line-haul traffic moved by the applicant and participating carriers between their yards in Chattanooga and points [371] throughout the country. The applicant alleges that such a division is several times greater than the charge formerly collected by the Southern under the reciprocal switching arrangements. However, the removal of that portion of the Boyce area from the

[1] Cincinnati, New Orleans & Texas Pacific Ry., Terminal Tariff No. 489-H, Supp. 4, I. C. C. No. 4707.

Chattanooga switching districts resulted in no increased freight rates to the shippers. The difference between the former switching charge and the 20-percent division of line-haul revenue comes out of the pockets of the applicant and other participating carriers.

On brief, the applicant alleges that perhaps the most serious deficiency in the present railroad service at Boyce is the lack of reciprocal switching; that upon completion of the extension the entire area would be restored by the applicant to the Chattanooga switching district; and that the reestablishment of reciprocal switching would be equivalent to locating each of the industries in question on all railroads serving Chattanooga.

Soon after the reciprocal switching arrangements were canceled by the Southern, the Central of Georgia Railway, Cramet, Inc., and others filed a complaint with this Commission requesting the elimination of provisions in Southern's tariffs withdrawing the Boyce area from the Chattanoga switching district.[2] The matters involved in the complaints were determined by the Commission, division 2, in its report and order in *Rutile Ore. Gulf and South Atlantic Ports to Tennessee,* 298 I. C. C. 439. The effect of the Commission's order therein was to require the reestablishment of reciprocal switching in the Boyce area, effective August 10, 1956, subsequently postponed to August 27, 1956. Upon petition of the Southern for reconsideration and reargument, the Commission stayed the effective date pending disposition of the petition.

Although matters pertaining to reciprocal switching in the Boyce area are not at issue in this proceeding, they are

[2]Docket No. 31737, Cramet, Inc. v. Alabama Great Southern Railroad Company, et al., consolidated with I. C. C. No. 31677, Central of Georgia Railway Company v. Cincinnati, New Orleans & Texas Pacific Railway Company, and I. & S. No. 6284, Rutile Ore from Gulf and South Atlantic Ports to Tennessee, heard on June 7, 1955.

made the subject of considerable discussion of record and ordinarily would be factors to be considered as bearing on the need for the proposed line. However, in view of the fact that such issues are properly before the Commission in another proceeding, we need not accord them great weight here.

TESTIMONY ON BEHALF OF THE INDUSTRIES AND OTHERS

The general traffic manager of the Quaker Oats Company testified, among other things, that the present location of the company's plant in the Boyce area was selected largely because the site was accessible to the Tennessee River and the railroads of both the applicant and the [372] Southern. The record does not show whether transportation facilities by water are available at the present time. The plant has the services of all lines of railroad entering Chattanooga under reciprocal switching arrangements published in the tariffs of the various lines serving that city. The witness explains that the plant's rail-transportation business is predominantly transit; that it operates very largely on milling-in-transit rates; and that it enjoys milling-in-transit privileges on all the lines referred to above. He states that it has no rate difficulties; that the Southern always afforded good switching service to and from the plant; and that the service generally has been entirely adequate. His principal reasons for wanting the applicant's proposed lines are (1) to afford the plant an additional source of car supply, (2) to expedite service to some destinations by eliminating the loss of time consumed in switching under present conditions, and (3) to insure continuity of service in the event of strikes of the employees on one line or the other. In other words, if labor disturbances caused one of the lines to cease operation, the other would be available for use. He

believes that continued growth of the plant is, to some extent, dependent upon the service of two lines of railroad.

The witness admitted that the Southern had supplied the plant with plenty of cars for outbound shipments, but he complained that some of them had to be made suitable for loading at the expense of the Quaker Oats Company. Availability of the applicant's proposed line would cause no change in the present freight rates on commodities shipped to or from the plant. Under present switching arrangements, the plant is afforded an opportunity to route as much of its traffic over the applicant's line as it desires. The volume so routed was 1,500 carloads in 1954.

The vice president of the Central Soya Company stated that when the plant site was selected, the company was aware of its proximity to the applicant's main line, and he expected that it would be served by the applicant and all other lines reaching Chattanooga through reciprocal switching. Much of his testimony was devoted to alleged traffic disadvantages caused by the Southern's action in depriving the plant of reciprocal switching service. He stated that, in his opinion, a soybean and feed manufacturing plant could not exist without transit arrangements. He further stated that all the grain which the company merchandised since the plant commenced operation in April 1955 came in by river barges and moved out by trucks; that more than 3 million bushels of corn have moved out of the plant by truck since that time; that it would be as convenient to ship by truck as by rail; that the extent of the company's use of trucks in the future is entirely dependent upon "how realistic an attitude the carriers take in meeting our competition with our freight rates"; and that the [373] company would resort to the use of trucks if it considered the rail rates to be unreasonable.

The remaining industries designed to be served by the applicant's proposed line, hereinafter referred to as the

industry, are Cramet, Inc., and Heavy Minerals, Inc., which are now reached by the Southern's river track. As previously indicated, construction of the plant of Heavy Minerals, Inc., has not been started. The traffic manager of Crane Company, which controls the industry, testified that the industry is situated at a local point on the Southern Railway and is solely dependent upon that carrier for car-supply service, emergency switching, and rate publications; that the elimination of reciprocal switching made the industry a "captive" one; that it prevents the industry from routing traffic so as to enable it to take advantage of certain transit privileges; and that it forces the industry to use circuitous routes in many instances. The witness was asked concerning the financial benefit that would accrue to the industry if it had the service of the proposed line. He replied as follows:

> "That would be difficult to state, because we don't know what rates we are going to have to propose and, with a local point on a railroad, you don't have any assurance you are going to get the best rate from a competitive standpoint. Where there are two carriers, you are certainly going to get the consideration on a reasonable rate."

Up to the time of the hearing, the industry had not shipped a substantial volume of traffic, having used trucks to a considerable extent.

The Tennessee, Alabama & Georgia Railway Company, hereinafter called the Tennessee, did not intervene in this proceeding, but its general freight agent testifying on behalf of the applicant, stated that its railroad extends northerly from Gadsden, Ala., to Chattanooga, 92 miles. It makes connections with various trunklines at its termini, and its business is largely dependent upon traffic handled in interchange with those lines. The witness alleged that the Tennessee has been denied considerable traffic, destined

to or shipped from the Boyce area, because of the restrictive provisions of the tariff governing switching operations in that area. It is his understanding that the area would be open to reciprocal switching if the proposed line were constructed, and that the Tennessee would thereby recover much of the business that it has lost since the reciprocal switching arrangements at Boyce were canceled.

A member of the executive committee of the Chattanooga Chamber of Commerce and the traffic manager of the Chattanooga Manufacturer's Association, the latter being composed principally of manufacturing firms in the Chattanooga area, testified on behalf of the applicant. The gist of their testimony is that the industries in the Boyce area should have the services of two lines of railroad; that [374] direct access to the lines of both the Southern and the applicant would place the area in a position whereby it would be easier to induce other industries to settle in that locality; and that the industries never worried much about their transportation service prior to the time of removal of the Boyce area from the Chattanooga switching district.

A member of the Georgia Public Service Commission presented considerable testimony concerning the early history of the Western & Atlantic Railway which joined in the instant application. As previously indicated, that railway is owned by the State of Georgia and has been operated under lease by the applicant for many years. The State asserts that it has a vital interest in the applicant's proposal by virtue of such ownership. Its interest arises from the fact that, in accordance with the terms of the present 50-year lease, which expires on December 27, 1969, all additions and betterments made upon the leased line will revert to and become the property of the State; and that, if the applicant's proposed line were constructed, the State would gain a sizeable increase in the value of its railroad property. The rental, under the terms of the present lease,

is $540,000 annually, plus $60,000 a year for additions and betterments to the line.

Testimony on Behalf of the Southern

The Southern system operates 8,016 miles of railroad. It serves every State east of the Mississippi River and south of the Ohio and Potomac Rivers, except West Virginia, and reaches all important industrial centers in the South except Nashville, and Montgomery, Ala. The northern points of the Southern are Cincinnati, Ohio, and Washington, D. C. It serves all South Atlantic ports from Norfolk Va., to Jacksonville, Fla., except Wilmington, N. C., and reaches the gulf ports of Mobile, Ala., and New Orleans, La. Its western gateways are Memphis, and St. Louis, Mo.

Accordingly, it has the ability and capacity to handle traffic between the industries at Boyce and points within the territory described. The train service afforded by the Southern over many of the system lines previously has been shown.

The Southern showed that revenues which accrued to its system lines from freight traffic handled to and from the industries in the Boyce area from July 1, 1952, to June 30, 1955, amounted to $98,917 during the first 6 months of 1952; $350,812 in 1953; $414,053 in 1954; and $204,680 during the first 6 months of 1955. The revenues of the Southern were about 60 percent of the revenues accruing to all rail carriers from traffic to and from those industries. The general freight traffic manager of the Southern stated that, in his opinion, the industrial development of the Boyce area in the future will increase to the extent that its traffic will be 2 or 3 times greater than at present, but [375] that the Southern can proyide all the additional rail-transportation facilities necessary to handle such traffic no matter what the increase in volume may be. He stated also that

the applicant's proposed line is designed to take away a substantial portion of the traffic regardless of the extent to which the volume may increase in the future.

MATTERS RELATING TO JURISDICTION

In support of its contention that we have no jurisdiction in the premises, the applicant argues that the question should be determined in the light of the decision of the United States Court of Appeals in *Pennsylvania R. Co.* v. *Reading Co.*, 226 F. 2d 958, decided November 2, 1955, wherein the court affirmed the opinion of the United States District Court, 132 F. Supp. 616, finding that the track connection involved in that proceeding was an "industrial spur," the construction of which was permissible under section 1 (22) of the act without procuring a certificate of public convenience and necessity from us. We believe that the facts involved in the instant proceeding from a jurisdictional standpoint more closely resemble those in *Union Pac. R. Co.* v. *Denver & R. G. W. R. Co.*, 198 F. 2d 854, decided July 18, 1952. The court of appeals there confirmed the opinion of the United States District Court for the District of Utah, Central Division, holding that the trackage involved was an extension within the meaning of section 1 (18) of the act. These cases are discussed in *Alabama G. S. R. Co., Construction*, 295 I. C. C. 237, and the detail with respect thereto need not be repeated herein.

Questions relating to jurisdictional matters of the nature raised by the applicant in this proceeding have been considered and discussed in numerous cases decided by us and by the courts. None of them prescribes any concrete rules or formulas whereby a line of railroad partaking of the nature of a spur, industrial, or switching track, may be easily distinguished from an extension of a line of railroad. The line of demarcation between them has been closely drawn in many instances, and the question of our jurisdic-

tion has been determined in the light of the factors peculiar to each individual case. These include, among other things, matters pertaining to the purpose of the track sought to be constructed and the use to be made of it; the question whether new routes in interstate commerce would be established through the use of such track; and whether the construction and operation of the proposed track would constitute an invasion of another carrier's territory. In *Texas & P. Ry. Co.* v. *Gulf, C. & S. F. Ry. Co.*, 270 U. S. 266, the Supreme Court of the United States said:

> "A truer guide to the meaning of the terms extension and industrial track, as used in paragraphs 18 to 22, is furnished by the context and by the relation of [376] the specific provisions here in question to the railroad policy introduced by Transportation Act, 1920. * * *
>
> "When the clauses in paragraphs 18 to 22 are read in the light of this congressional policy, the meaning and scope of the terms extension and industrial track become clear. * * * where the proposed trackage extends into territory not theretofore served by the carrier, and particularly where it extends into territory already served by another carrier, its purpose and effect are, under the new policy of Congress, of national concern. For invasion through new construction of territory adequately served by another carrier, like the establishment of excessively low rates in order to secure traffic enjoyed by another, may be inimical to the national interest. If the purpose and effect of the new trackage is to extend substantially the line of a carrier into new territory, the proposed trackage constitutes an extension of the railroad within the meaning of paragraph 18, *although the line be short and although the character of the service contemplated be that commonly rendered to industries by means of spurs or industrial tracks.*" (Italics supplied.)

On oral argument, counsel for the applicant contends that before the rule with respect to our jurisdiction, as enunciated by the Supreme Court in the latter case, is applicable there must be found to exist three conditions; namely, (1) the territory sought to be reached must be new to the applicant, (2) it must be adequately served by the existing carrier, and (3) the proposed construction must be found to be inimical to the public interest. He states that the Boyce area is not new to the applicant; that it cannot be served adequately by the Southern; and that the proposed construction would not be an invasion of Southern's territory and would be beneficial to the public, and that therefore the above-quoted case is not applicable.

We are not in accord with the above stated contentions of counsel. We construe the words of the Court to mean that extension by a carrier of its line into territory served by another carrier may be inimical to the public interest, and therefore such an extension necessarily is within our jurisdiction requiring our determination of the question of the public convenience and necessity, regardless of the nature and extent of the extension.

As a guide for our jurisdictional determination in this proceeding, we are of the opinion that we have only to follow the precepts contained in the last sentence of the above-quoted decision. The record clearly shows that the purpose and effect of the applicant's proposal is to extend its line substantially. This leaves one remaining factor which involves the question as to whether the area to be reached by the proposed line is within the meaning of the term "new territory" as contemplated by the Court.

It is true that one side of the Boyce area is skirted by parallel main lines of both the applicant and the Southern. However, the applicant never had tracks within the area, and there is nothing to indicate [377] that it ever had the intention of building any prior to the advent of the heavy

industries. On the other hand, the Southern has performed the rail services for all industries in the area, both new and old, since 1898. The applicant cannot justly claim that the area is within its territory on the strength of a mere showing that it serves the general area. The locations of the industries are such that the applicant's main line would be extended a distance of over 4 miles in order to reach them.

We cannot conclude that the mere presence of a railroad in a general area gives it a right to serve all industries anywhere within such undefined geographical area. If such were the case, the doctrine of *Texas & P. Ry. Co. v. Gulf, C. & S. F. Ry. Co., supra,* holding that there may be an invasion although the line be short and the character of service contemplated be that commonly rendered to the industries by means of spurs or industrial tracks, never would be applicable. The fact is that both the Southern and the applicant served the general area involved herein just as both The Texas and Pacific Railway Company and the Gulf, Colorado and Santa Fe Railway Company did in the case just cited, and that the Southern alone serves the specific area involved just as the Texas & Pacific alone serves the specific area and was held to have the right to continue such service without interference by a competing carrier.

Under the foregoing circumstances, we are of the opinion (1) that the Boyce area is a territory served exclusively by the Southern, (2) that the proposed construction would constitute an invasion of that territory, and (3) that the area falls within the meaning of the term "new territory" as contemplated by the court in *Texas & P. Ry. Co.* v. *Gulf, C. & S. F. Ry. Co., supra.* We believe that we have jurisdiction in the premises, and, accordingly, the motion to dismiss the application will be overruled.

Matters Relating to Public Convenience and Necessity

On oral argument, counsel for the applicant requested that we approach the matter of public convenience and necessity in accordance with basic principles established in the past by the Commission and the courts. They contend that such principles were instituted to prevent the building of unnecessary lines of railroad, the waste of resources, and the improvident and unnecessary expenditure of carrier funds in the construction and operation of lines which are not needed to insure adequate service. We are wholly in accord with those contentions. With reference to our duty in arriving at a determination of the matter, they refer to *Chesapeake & O. Ry. Co.* v. *United States*, 283 U. S. 35, 42, in which the Supreme Court of the United States said:

[378] "There is no specification of the considerations by which the Commission is to be governed in determining whether the public convenience and necessity require the proposed construction. Under the Act it was the duty of the Commission to find the facts and, in the exercise of a reasonable judgment, to determine that question."

The predominant factor suggested appears to involve the question of adequacy or inadequacy of service now afforded by the Southern in the Boyce area. The other factors involve matters relating to the geographical facts of the situations, the equities of the proposal, the needs of an expanding economy, the character of the traffic, and the advantages of market competition afforded to shippers through direct access to more than one line of railroad. Applicant contends that the question of adequacy or inadequacy of service is not limited to the actual switching performed by the Southern in the Boyce area but that it

relates also to matters pertaining to routes and rates, car supply, expeditious movement of traffic in line-haul service, transit privileges, loss-and-damage claim handling, adjustments of various kinds, and continuity of service in the event of strikes on one line or the other. Counsel believe that inadequacy of the present service afforded by the Southern can be established even though there has been no specific showing of deficiency in service; that inadequacies of service are inherent in situations where an area is served by only 1 line of railroad; and that shippers are better off when they have the services of more than 1 line of railroad.

Witnesses for the industries in the Boyce area have not seriously disputed the adequacy of the Southern's service, and their testimony indicates that they want another line of railroad primarily for bargaining purposes. The industries served by the Southern's river track support the application almost entirely for the reason that they are not accorded reciprocal switching. Practically all of their existing difficulties, including adequate transit privileges, will be satisfied if they are accorded reciprocal switching, and that matter is before the Commission and will be determined in an appropriate proceeding. Vague references to obtaining a more dependable car supply are not convincing.

Conclusion and Findings

It is doubtful that the rail-transportation service rendered to any industry served by a single carrier meets all the requirements of "adequate service" which the applicant believes should be accorded the industries in the Boyce area. We have found, in many cases, that industries desire the service of as many railroads as possible, regardless of the precepts of Congress embodied in its national transportation policy. Measured by the standard of service ordinarily [379] performed by railroads throughout the

country, we believe that the record supports a conclusion that the service accorded by the Southern to the industries in the Boyce area is adequate to meet all the reasonable traffic demands of those industries and, under that circumstance, the proposed extension, costing over one-half million dollars, would be an expenditure of money not in furtherance of the national transportation policy, and would be inimical to the public interest.

We have reviewed the exceptions to the examiner's proposed report, the findings requested therein, and the contentions of all parties as to either fact or law. Matters pertaining thereto which are not discussed herein, or reflected in our findings and conclusions, have been given due consideration and are found to be either without material significance or not justified.

We find (1) that the proposal herein is a matter within our jurisdiction under section 1 (18) of the act, and (2) that the present and future public convenience and necessity are not shown to require construction and operation by The Nashville, Chattanooga & St. Louis Railway and the Western & Atlantic Railroad of the line of railroad in Hamilton County, Tenn., described herein. An appropriate order will be entered, overruling the motion to dismiss and denying the application.

APPENDIX C

Order of September 4, 1956.
Interstate Commerce Commission
Finance Docket No. 18942

Nashville, Chattanooga & St. Louis Railway, *et al.*
Construction

APPENDIX C

ORDER

At a Session of the Interstate Commerce Commission, Division 4, held at its office in Washington, D. C. on the 4th day of September, A.D. 1956.

Finance Docket No. 18942
Nashville, Chattanooga & St. Louis Railway, et al
Construction

Investigation of the matters and things involved in this proceeding having been made, a hearing having been held, and said division having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof;

It is ordered, That the motion to dismiss the application herein on jurisdictional grounds, be, and it is hereby, overruled.

And it is further ordered, That the application herein be, and it is hereby, denied.

By the Commission, division 4.

HAROLD D. McCOY,
Secretary.

(SEAL)

APPENDIX D

Order of February 12, 1957
Interstate Commerce Commission
Finance Docket No. 18942
Nashville, Chattanooga & St. Louis Railway, *et al.*
Construction

APPENDIX D

ORDER

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 12th day of February, A.D. 1957.

Finance Docket No. 18942
Nashville, Chattanooga & St. Louis Railway, et al.
Construction

It appearing, That the Commission, by division 4, in its report and order dated September 4, 1956, in the above-entitled proceeding, denied the application of The Nashville, Chattanooga and St. Louis Railway and the Western & Atlantic Railroad to construct and operate a line of railroad in Hamilton County, Tenn., described in the report aforesaid and, overruled a motion to dismiss said application on jurisdictional grounds;

It further appearing, That on October 15, 1956, the aforesaid applicants filed a petition for reargument and reconsideration and renewed their request for dismissal of the application for want of jurisdiction, or, in the alternative, that the Commission find that public convenience and necessity require and will require the authority sought;

It further appearing, That on October 22, 1956, Cramet Inc., an intervener in support, filed a reply in behalf of the said petition of applicants;

It further appearing, That on November 13, 1956, Southern Railway Company, The Cincinnati, New Orleans and Texas Pacific Railway Company, and Georgia Industrial Realty Company, interveners in opposition, filed a reply in opposition to the aforesaid petition of applicants;

And it further appearing, Upon consideration of the record herein, and the contentions set forth in said petition and replies, that there has been presented no error of fact or law with respect to the matters complained of by the petitioners, and that no showing has been made warranting reconsideration or further hearing in the said proceeding or dismissal of the said application on jurisdictional grounds;

It is ordered, That said petition be, and it is hereby, denied.

By the Commission.

HAROLD D. McCOY,
Secretary.

(SEAL)

APPENDIX E

Statutes Involved

Interstate Commerce Act, ~~49~~ 41 Stat. ~~543~~ 477, 49 U.S.C., Section 1(18) and 22).

APPENDIX E.

STATUTES INVOLVED.

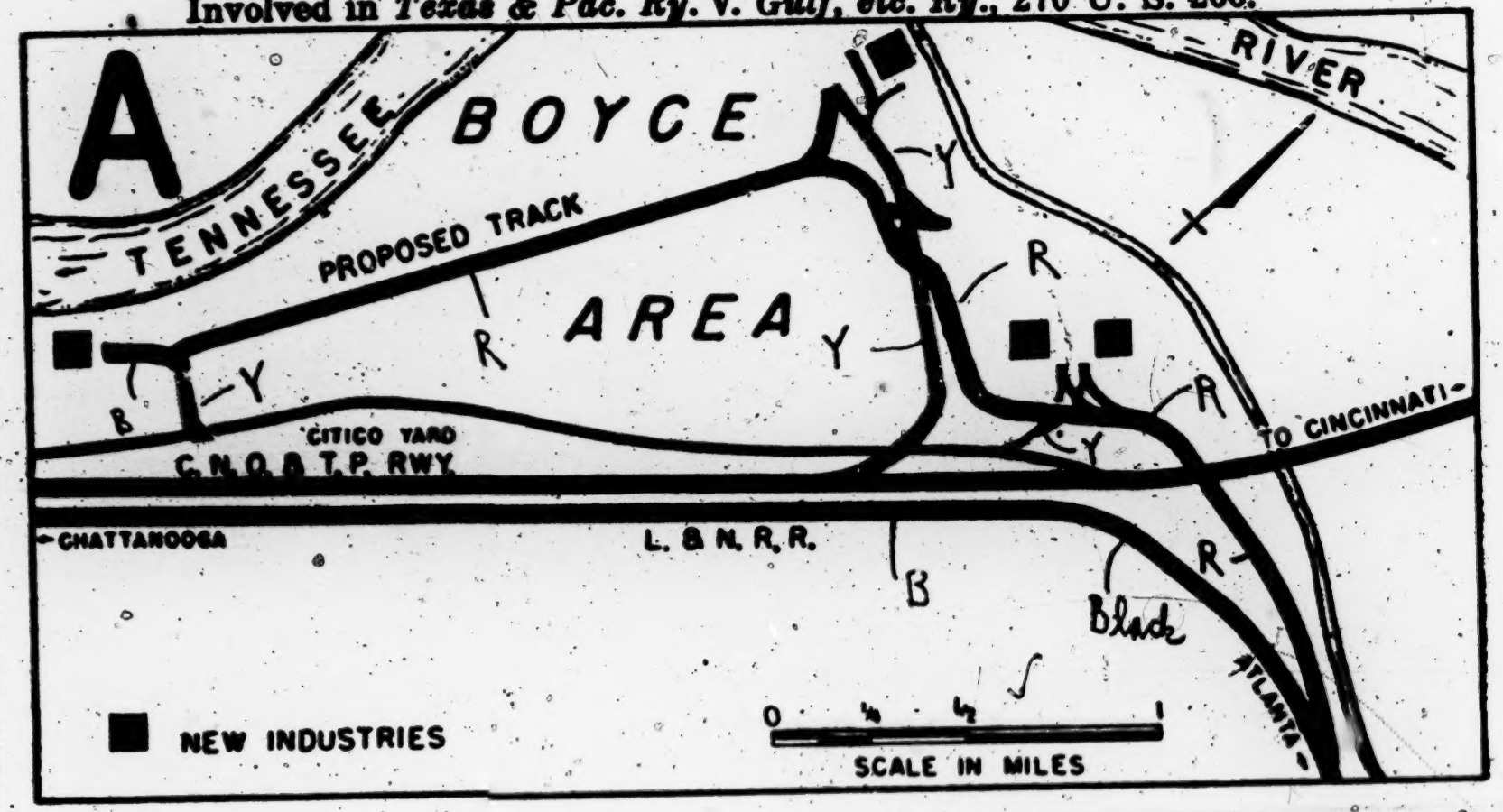
Interstate Commerce Act, 41 Stat. 477, 49 U. S. C., Section 1(18) and (22).

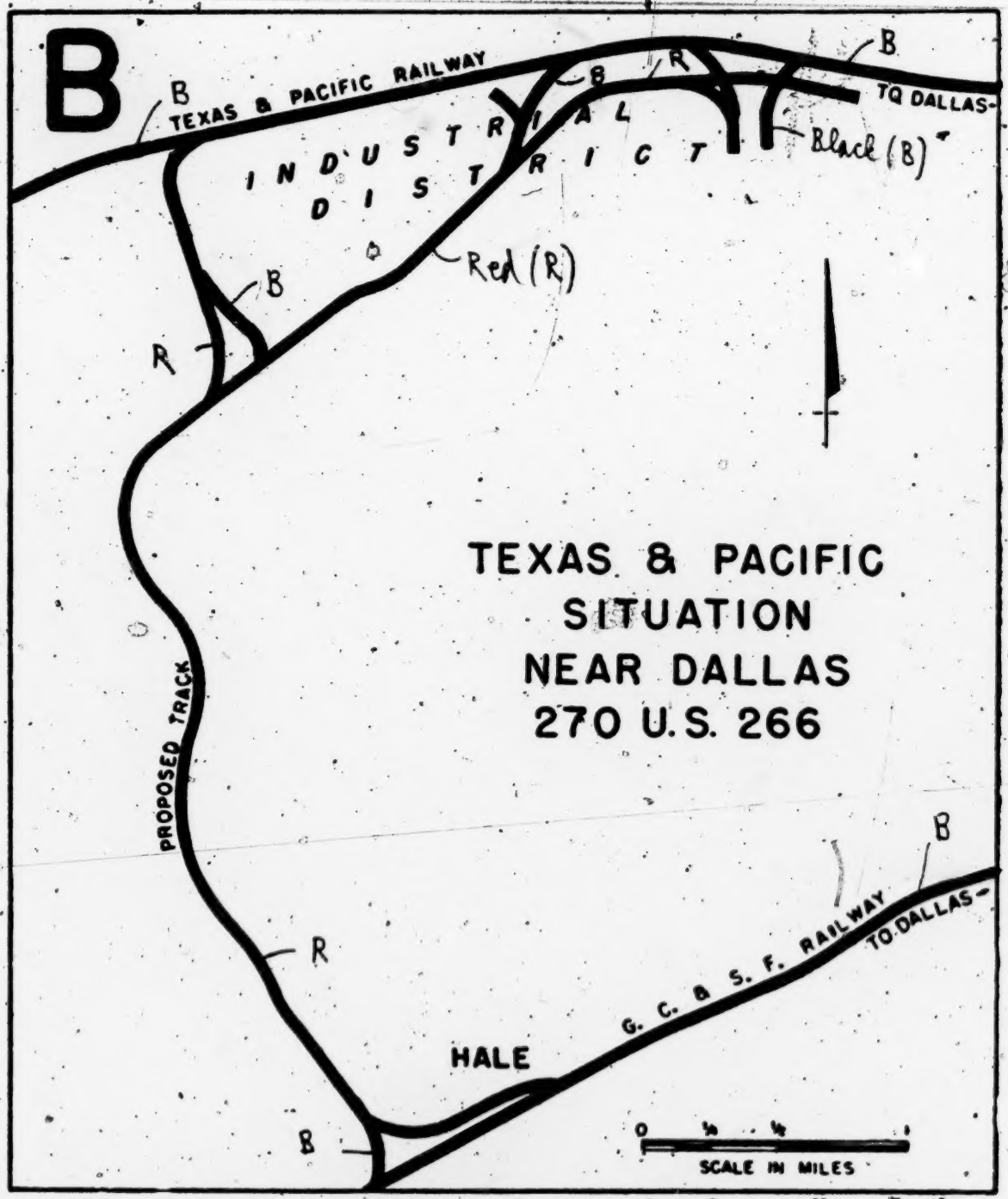
1(18). After ninety days after this paragraph takes effect no carrier by railroad subject to this part shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this part over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this part shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment. Nothing in this paragraph or in section 5 shall be considered to prohibit the making of contracts between carriers by railroad subject to this part, without the approval of the Commission, for the joint ownership or joint use of spur, industrial, team, switching, or side tracks.

1(22). The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation.

APPENDIX F

Drawings Showing Proposed Trackage at Boyce, Tennessee, and that Involved in *Texas & Pac. Ry.* v. *Gulf, etc. Ry.*, 270 U. S. 266.





LEGEND: Black—existing main lines; red—proposed trackage; yellow—Southern Railway's existing industrial tracks; blue—new industries.